

BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

16-49

LAWRENCE G. SKOTNIK,

Appellant

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS,

Appellee

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ISSUE PRESENTED FOR REVIEW

The Board failed to comply with its duty to assist the Veteran when it failed to provide him with an examination regarding the etiology of his COPD, which he asserted was due to in-service Agent Orange exposure. It concluded that Mr. Skotnik was not entitled to a medical examination because he did not present competent medical evidence of a nexus between his COPD and his service. This is a higher standard than required by law. The Board also failed to provide adequate reasons or bases for its decision not to seek such an opinion. Where the Board denied Mr. Skotnik's claim despite limited evidence in the record as to what caused his COPD and without the benefit of a VA examination on the issue, did it commit prejudicial legal error?

STATEMENT OF THE CASE

Lawrence G. Skotnik served honorably in the United States Army from June 1965 through June 1967, including service in Vietnam. R-571. He was awarded the Vietnam Campaign Medal, Vietnam Service Medal, and National Defense Service Medal. *Id.*

In May 2008, Mr. Skotnik began treatment for COPD and early obstructive changes. *See* R-450 (450-53); R-445 (445-48); R-441 (441-43); R-224 (222-24); R-255 (253-56). The Veteran filed a "request for some type of compensation" for his COPD in December 2008. R-544-47. In March 2009, Mr. Skotnik asserted that his medical problems stemmed from "herbicide used during Vietnam[.]" R-517-18.

In July 2009, the Regional Office denied Mr. Skotnik service connection for his COPD based on a lack of evidence presenting a “link of [his] current condition to [his] military service[.]” R-388 (383-90). Mr. Skotnik filed a notice of disagreement the following February. R-376. In September 2010, the Veteran asserted that his medical problems could be linked to his Agent Orange exposure, R-358-59, and filed a claim for breathing problems and viruses due to Agent Orange. R-342. The following July, the RO continued to deny service connection for his COPD, claimed as breathing problems and viruses. R-208 (201-18).

An October 2013 statement of the case continued the denial of service connection for COPD. R-173 (152-74). Later that month, Mr. Skotnik submitted his VA Form 9 to perfect his appeal. R-65-68. He described an article that he read in a report of herbicide exposure which described how Vietnam veterans may be carrying diseases as a result of such exposure. R-66-68. These diseases attack the internal organs, but do not appear until a decade or more after herbicide contact. *Id.*

In November 2015, the Board denied Mr. Skotnik service connection and compensation for his COPD. R-9 (1-13). It determined a medical examination was not warranted because “the record does not contain any competent evidence suggesting a link between the Veteran’s COPD and herbicide exposure[.]” R-8; *see* R-5. The Board also concluded that Mr. Skotnik only provided “his opinions regarding the etiology of his COPD” and failed to “cite to supporting medical opinion or

clinical or medical treatise evidence” in support of his claim. R-8. This appeal ensued.

SUMMARY OF THE ARGUMENT

VA’s duty to assist a veteran requires it to obtain a medical opinion when such an opinion is necessary to make a decision on the claim. In this case, Mr. Skotnik sought service connection and compensation for COPD due to Agent Orange exposure. The Board denied service connection and determined that an examination was not warranted because there was no “medical evidence of record regarding a nexus between a current respiratory disability and service[.]” The Board misinterpreted the law when it demanded a higher standard than required to indicate a causal connection between Mr. Skotnik’s COPD and his service. This led to its violation of the duty to assist and constituted prejudicial error. In addition, its determination that Mr. Skotnik did not reference any medical evidence was erroneous, as he cited a medical article from a report of herbicide exposure. Finally, the Board failed to provide adequate reasons or bases for its decision.

STANDARD OF REVIEW

The Court reviews the Board’s decisions regarding claims for service connection under the clearly erroneous standard. A determination regarding the degree of impairment for purposes of rating a disability is an issue of fact. *Hayes v. Brown*, 9 Vet.App. 67, 72 (1996). The Board’s answer to this question is subject to review for clear error. *Davis v. West*, 13 Vet.App. 178, 184 (1999).

However, the Court reviews claimed legal errors by the Board under the *de novo* standard, by which the Board's decision is not entitled to any deference. 38 U.S.C. § 7261(a); *see Butts v. Brown*, 5 Vet. App. 532, 538 (1993) (*en banc*). The Court will set aside a conclusion of law made by the Board when that conclusion is determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Butts*, 5 Vet. App. at 538. The Court should determine whether the Board's decision, in which it misinterpreted the law and failed to provide adequate reasons or bases for its decision, is not in accordance with the law.

ARGUMENT

The Board failed to ensure compliance with the duty to assist the Veteran and failed to provide adequate reasons or bases for its decision when it denied him entitlement to service connection for COPD without the benefit of a VA examination on the issue.

The Board misinterpreted the law and failed to ensure that VA's duty to assist the Veteran was satisfied when it failed to obtain an examination to assess the etiology of Mr. Skotnik's COPD. The Board must consider all relevant evidence of record, and discuss all "potentially applicable" laws and regulations. *Majeed v. Principi*, 16 Vet.App. 421, 431 (2002). Under 38 U.S.C. § 7104(d)(1), a decision of the Board shall include a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record. *Gilbert v. Derwinski*, 1 Vet.App. 49, 56 (1990). Deficiencies

in the Board's analysis in the instant case preclude effective judicial review. *See Simington v. West*, 11 Vet.App. 41, 45 (1998).

A veteran is entitled to the assistance of VA in developing the facts pertinent to his or her claim. 38 U.S.C. § 5103A(a)(1). VA's duty to assist a veteran requires VA to obtain a medical opinion "when such an . . . opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A(d)(1); *see Charles v. Principi*, 16 Vet.App. 370, 375 (2002) (Board erred in failing to obtain medical nexus opinion necessary to make decision on claim); 38 C.F.R. § 3.159(c)(4)(i)(C) (2015). VA is required to assist a veteran unless "no reasonable possibility exists that such assistance would aid in substantiating the claim." 38 U.S.C. § 5103A(a)(2). This duty applies to the Board as well as the RO. *Holland v. Brown*, 6 Vet.App. 443, 448 (1994).

The Board erred by failing to consider whether Mr. Skotnik's COPD is related to herbicide exposure. The Court reviews four elements to determine if a medical examination is necessary. *McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006). Those elements are: (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability, (2) evidence establishing that an event, injury, or disease occurred in service or establishing certain diseases manifesting during an applicable presumptive period for which the claimant qualifies, and (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the veteran's service, but (4) insufficient competent medical evidence on file for the Secretary to make a decision on the claim. *Id.*

Mr. Skotnik's claim fulfilled the elements of the *McLendon* test. Mr. Skotnik has been treated for COPD since 2008, fulfilling the first element. *See* R-255; R-441; R-445; R-450; *see* 20 Vet.App. at 81. Based on his period and location of active service in Vietnam, Mr. Skotnik is also presumed to have been exposed to herbicides. R-7; R-571. This fulfills the second *McLendon* element. *See* 20 Vet.App. at 81. By its own admission, the Board recognized that the fourth *McLendon* element was met as it stated that the medical records in evidence were not sufficient to demonstrate the crucial link needed for service connection. R-8.

Thus, the relevant inquiry regarding Mr. Skotnik's eligibility for service connection for his COPD hinges on the third element, which considers "whether evidence 'indicates' that a disability, or persistent or recurrent symptoms of a disability, 'may be associated with the claimant's . . . service,' 38 U.S.C. § 5103A(d)(2)(B) or 'with another service-connected disability,' 38 C.F.R. § 3.159(c)(4)(i)(C)." *McLendon*, 20 Vet.App. at 83. Specifically, the third requirement, i.e., an "indication" that a condition "may be associated" with service, establishes a "low threshold." *Id.* Moreover, when deciding whether an examination is necessary, the Secretary shall consider the evidence of record, "taking into consideration all information and lay or medical evidence (including statements of the claimant)." 38 U.S.C. § 5103A(d)(2). "The Board's ultimate conclusion that a medical examination is not necessary pursuant to section 5103A(d)(2) is reviewed under the 'arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law’ standard of review.” *McLendon*, 20 Vet.App. at 81.

Despite the low standard for indication of nexus, the Board determined that a VA examination was not required because “the record does not contain any competent evidence suggesting a link between the Veteran’s COPD and herbicide exposure[.]” R-8. This was error, as the Board did not provide sufficient reasons for rejecting the evidence of record for purposes of meeting the “low threshold” as described in the third element of *McLendon*. In fact, while “competent” evidence applies to the standard in 38 U.S.C. § 5103(A)(d)(2)(A), which deals with demonstrating a current disability, subsection (B) requires only that the evidence “indicates” that the Veteran’s disability “may be associated” with service, and this is a “less-demanding [evidentiary] standard.” *Waters v. Shinseki*, 601 F.3d 1274, 1277 (Fed. Cir. 2010). Furthermore, if Mr. Skotnik had “competent evidence” of a causal connection, a VA examination would not be necessary because this would satisfy the standard for an award of service connection.

Although the Board acknowledged Mr. Skotnik’s contention regarding the relationship between his service and COPD, it nonetheless determined that Mr. Skotnik’s submissions were simply “his own opinions” as he failed to “cite supporting medical opinion or clinical or medical treatise evidence which pertains to his own specific disability picture.” R-8. Yet Mr. Skotnik contended that his COPD is related to his in-service herbicide exposure by referring to an article which indicates

conditions caused by herbicides may not appear until many years after exposure. R-66-68; R-358-59; R-517-18. The Veteran specifically noted that the article, from a report on herbicide exposure, stated that Vietnam veterans may be carrying diseases after exposure which attack most internal organs but usually do not appear for a decade or longer. R-66-68.

This evidence triggered the duty to assist under *McLendon*, as it “indicates” there “may” be a relationship between his COPD and herbicide exposure. 20 Vet.App. at 83. Hence, the Board made a decision without information that was necessary to properly adjudicate Mr. Skotnik’s claim as it denied him a VA examination. By requiring Mr. Skotnik to submit competent medical evidence of this relationship, the Board applied a higher standard than required. *See Massey v. Brown*, 7 Vet.App. 204, 208 (1994) (finding the Board erred when it denied an increased evaluation based on a higher standard than that found in the relevant diagnostic code). In fact, while competent evidence is required for the first and fourth *McLendon* elements, triggering the duty to assist with an inquiry into the third elements explicitly requires only an indication of a possible nexus; any requirement for competent evidence is explicitly absent. *See* 20 Vet.App. at 83;

The Veteran is competent to report medical evidence which he personally read. *See Jandreau v. Nicholson*, 492 F. 3d 1372, 1377 (Fed. Cir. 2007) (finding a veteran competent to report statements made to him by his physician). This amounts to more than his own unsubstantiated opinion. In light of Mr. Skotnik’s medical reference, the

Board's conclusion that he simply provided his own opinions was also erroneous. R-8; R-66-68. Had the Board not erroneously categorized Mr. Skotnik's referenced medical article as his own lay opinion, it may have found the Veteran was entitled to service connection and compensation for his COPD or at least an examination.

At a minimum, remand is warranted as the Board failed to provide adequate reasons or bases for its determination that a VA examination was not warranted because that the medical article Mr. Skotnik referenced did not constitute more than his own opinions. R-8; *see Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (the Board is required to provide an adequate statement of reasons or bases "for its rejection of any material evidence favorable to the claimant"). R-5, 8. The Board also erred when it determined that the record was devoid of any suggestion of a link between the Veteran's COPD and herbicide exposure. R-8. Without such an adequate discussion of the evidence, Mr. Skotnik is unable to determine the precise basis for the Board's denial of his claim.

CONCLUSION

Mr. Skotnik was exposed to herbicides during his service in Vietnam. He also suffers from COPD. He asserted his herbicide exposure is connected to his COPD based on a medical article he read in a report of herbicide exposure. Thus, a VA examination was required to determine the etiology of this disease as the record indicates there may be a nexus between Mr. Skotnik's service and respiratory disease.

In view of the foregoing, the Board's November 2015 decision where it denied Mr. Skotnik service connection for his COPD constituted a misinterpretation of the law and a failure to provide adequate reasons or bases for its decision. The Board's decision should be vacated and the appeal remanded with instructions for the Board to properly interpret the law and provide adequate reasons or bases for its decision.

Respectfully submitted,

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